FILE COPY

Office-Supreme Court, U.S.
FILED
APR 30 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 767.

JOHN TAXIN and BERNARD TAXIN trading as JOHN TAXIN CO.,

Petitioners,

v.

HONORABLE HAROLD K. WOOD, Judge of the District Court of the United States for the Eastern District of Pennsylvania and the other Judges of said Court,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

HARRY SHAPIRO,
HERBERT W. STALLMANN,
[illegible] S. 15th St.,
Philadelphia 2, Penna.,
Attorneys for Respondents.

[illegible], 711 Sa. 6th St., Phila. 47, Pa.

INDEX.

	Page
RESPONDENTS' BRIEF IN OPPOSITION	1
RESPONDENTS' APPENDIX	9
Excerpts from Testimony.	
Hearing of November 5, 1959	9
Hearing of December 28, 1959	11
Pretrial Oral Examination of Samuel P. Mandell, January 11, 1960	20

TABLE OF CITATIONS.

	Page
Banker's Life and Cas. Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953)	4
Ex Parte Fahey, 322 U. S. 258; 67 S. Ct. 1558, 91 L. Ed. 2041 (1947)	3
Moore's Federal Practice, 2d Edition, Sec. 26.37(1), Vol. 4, P. 1210, and Sec. 54.12(1), Vol. 6, P. 116	4
Pennsylvania Railroad v. Kirkpatrick, 203 Fed. 2d 149 (1953)	3
Re Rice, 39 L. Ed. 198, 155 U. S. 396 (1894)	4
Roche v. Evaporated Milk Association, 319 U. S. 21, 63 S. Ct. 558, 87 Lawyers Ed. 1185 (1943)	2, 3, 4

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 767.

JOHN TAXIN AND BERNARD TAXIN TRADING AS JOHN TAXIN CO.,

Petitioners,

v.

HONORABLE HAROLD K. WOOD, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND THE OTHER JUDGES OF SAID COURT,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

In the Court below the petitioners, seeking mandamus, complained that the District Court had made an order which the petitioners construed as permitting them to examine the defendants in an Anti-Trust action (in the course of depositions) upon the details of an asserted conspiracy, and to inquire into the validity of an admittedly executed release; but that when it came to actually taking the depositions, the District Judge ruled that under its order the petitioners could not, upon depositions, inquire into the asserted conspiracy.

The Court below (U. S. Circuit Court of Appeals for the Third Circuit) refused to issue a writ of mandamus directing the Trial Judge to permit the questioning. It is from this refusal that the petitioners seek Certiorari.

This Court held in *Roche v. Evaporated Milk Association*, 319 U. S. 21, 63 S. Ct. 558, 87 Lawyers Ed. 1185, 1190 (1943), that the traditional use of the writ is to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so.

The Petitioners do not complain that the respondent Trial Judge Wood has exceeded the bounds of his prescribed jurisdiction, or that he has refused to exercise his authority. It is clear upon analysis that the fundamental and only complaint in the petition for mandamus is that Judge Wood ruled erroneously upon the petitioners' attempt to go into the question of conspiracy upon depositions. But it is equally clear, from the nature of mandamus, that the writ will not issue to correct an error (assuming *arguendo* that the ruling was error).

It is true that the petitioners seek to present this ruling upon depositions in a different light. They claim that they were misled by the Order of December 14th into thinking that such an inquiry would be allowed on depositions. But it should be patent that whether or not they were misled, and whether or not they should have been misled, is not relevant here. Thus:

If the Order of December 14th, properly construed, permitted inquiry into the conspiracy upon depositions, and the petitioners so construed it, then the petitioners were not misled. Accordingly, they could have no complaint against the order; and there is no need to certify it for appeal, since the order is just what the petitioners want it to be.

On the other hand: if the order, properly construed, does not permit inquiry into conspiracy on depositions, then the fault lies with the petitioners because their counsel made an error in construing it; and such error will not constitute a ground either for appeal or mandamus.

Now to return to the first supposition: that the order (properly construed) permits inquiry into conspiracy on

depositions; but that when it came to taking the depositions, Trial Judge Wood ruled that the inquiry could not be made.

If that is the gravamen of the petitioners' complaint, then their quarrel is simply with a ruling against an attempted discovery; and it is completely immaterial that the ruling was preceded by the order of December 14th. So far as the ruling on depositions is concerned, the petitioners are in exactly the same position as they would have been if there had been no order of December 14th. The ruling on depositions is right or wrong, appealable or not, ground or no ground for mandamus, regardless of the order of December 14th.

The proper inquiry in this Court then is this: should the Court below have granted mandamus compelling Trial Judge Wood to permit the sought-after discovery?

This Court has said that mandamus, being an extraordinary remedy, is reserved for really extraordinary causes: *Ex Parte Fahey*, 322 U. S. 258, 260; 67 S. Ct. 1558, 91 L. Ed. 2041, 2043 (1947).

There is nothing extraordinary about the cause in which the petitioners sought their writ of mandamus. Civil suits by private individuals for triple damages for asserted violation of Anti-Trust laws are matters of daily or weekly occurrence in the Federal Courts.

The United States Court of Appeals for the Third Circuit has decided, in *Pennsylvania Railroad v. Kirkpatrick*, 203 Fed. 2d 149 (1953), that mandamus hardly lies to correct asserted error in rulings upon discovery matters, saying that whether the District Judge decided such matters correctly or not (there was involved an order directing production of a document) was not before it.

It may be added that one of the reasons impelling this Court to decide in *Roche, supra*, that the Court below had erred in granting a petition for mandamus, was that no action or omission on the part of the District Court Judge thwarted or tended to thwart appellate review of its ruling.

The same situation exists here. At issue is merely a ruling on discovery, and hundreds of rulings on discovery are made daily in the Federal Courts. To hold them all appealable or, what is more serious, proper subjects for writs of mandamus, would be to impose intolerable burdens on this Court as well as upon Circuit Courts of Appeal; and would be to strike at a long established and salutary rule denying review of most interlocutory matters: See Moore's Federal Practice, 2d Edition, Sec. 26.37(1), Vol. 4, P. 1210, and Sec. 54.12(1), Vol. 6, P. 116.

Not even the risk that a protracted case might have to be tried over again justifies issue of a writ on such ground: *Roche, supra,* 87 L. Ed. at P. 1192.

Unless the Court whose action is sought to be prohibited has clearly no jurisdiction, the granting or refusal of a Writ of Mandamus is discretionary: Re Rice, 39 L. Ed. 198, 201, 155 U. S. 396, 402-3 (1894). Accordingly, the general rule applies that an Appellate Court will not reverse discretionary orders of the court below in the absence of clear abuse of discretion: *Banker's Life and Cas. Co. v. Holland,* 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106, 112 (1953); and abuse can hardly be said to exist here.

But this Court's holding in *Rice, supra,* is even more immediately applicable to the petition before it. One of the prayers in the Petition for Mandamus below was that the writ issue to compel the District Court "to so interpret the opinion and order of December 14, 1959 as to permit petitioners to have full and complete pre-trial discovery of defendants and particularly to permit petitioners to interrogate defendants on the issue of conspiracy. . . ."

This Court said in *Rice:*

> "The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way. . . ."

It is believed that the above considerations are in themselves sufficient to justify a denial of the Petition for Certio-

rari. However, we desire to point out that the petitioners were not actually denied (in the District Court) the right to take depositions in proof of their averment that the release was part and parcel of the alleged conspiracy.

Some additional review of the facts is necessary to demonstrate the statement just made.

Prior to the order of December 4, 1958, the petitioners (as plaintiffs in the District Court) had filed a motion for leave to take the depositions of the defendants in the District Court action *before* those defendants took the depositions of the plaintiffs. The District Court denied the motion (Respondents' Appendix, p. 9). When the District Court granted the separate trial upon the issue *inter alia* of the validity of the release, the plaintiffs in the District Court sought and were granted the right to take the depositions of the defendants in their attempt to prove that the release was part and parcel of the alleged conspiracy; and now those plaintiffs (petitioners here) take the position that they could not prove their "part and parcel" theory without first establishing the conspiracy itself.

We believe, however, and urge, that the grievance of the petitioners in this regard disappears completely in view (a) of the offer made to counsel for the plaintiffs in the District Court during the course of the depositions he was taking preparatory to the holding of the separate trial and (b) of Judge Wood's own construction of his orders and rulings. During depositions counsel for the defendants stated to counsel for the plaintiffs that there would be no objection to the latter's assuming that there was a conspiracy for the purpose of his interrogation, and then proving that the release was part and parcel of the conspiracy (see colloquy between counsel, Respondents' Appendix, pp. 21, 22).

Petitioners here have argued (page 9 of their petition) that they are faced with the problem of proving fraud where a release plus x proves the fraud, and they were prevented from proving x. We believe it clear that if they

were given the opportunity of assuming x to be true, they had no need to prove x.

Judge Wood made it perfectly clear that the plaintiffs in the district court could prove their part-and-parcel theory (in attacking the validity of the release) in the depositions preceding the separate trial, but could not prove the general conspiracy charged in the complaint. Here is the relevant excerpt from the Respondents' Appendix, p. 15:

> "Mr. Schaffer: I want to develop the general conspiracy that I claim exists in this basic case.
>
> "The Court: Well, that you will not be permitted to do.
>
> "Mr. Schaffer: All right, Your Honor.
>
> "The Court: And if that is your request it is denied. And your request for an interlocutory order is denied.
>
> "Now, you will be permitted to raise any discovery that you wish to in these depositions, which you can connect up with the obtaining of this release. But you are not going to prove the general conspiracy which you charge in your complaint at this time, and it was never intended that you would, nor was it intended that after the release question is resolved that you would be precluded from doing it at that time. I don't know what will happen after that."

Thus it is clear that both Judge Wood and opposing counsel removed all obstacles that might hinder plaintiffs in the district court from proving their averment that the release which the plaintiffs gave the defendants was invalid because it was part and parcel of the general conspiracy averred in the complaint. Accordingly, it is urged that from the standpoint of the merits, as well as from every other standpoint, the court below was right in denying the Petition for Mandamus.

To summarize:

(1) The granting or refusal of a Writ of Mandamus is the exercise of a discretionary judicial power.

(2) An appellate court will not reverse the action of an inferior tribunal in granting or refusing mandamus unless clear abuse of discretion is shown.

(3) No such abuse exists here.

(4) Mandamus is reserved for extraordinary causes and no extraordinary cause exists here.

(5) Mandamus will not issue to compel a court below to decide a matter before it in a particular way.

(6) The Writ of Mandamus is issued rarely, if ever, in discovery matters.

(7) From the standpoint of the merits, the court below committed no error in denying the writ.

It is urged that the order of the court below denying the Petition for the writ be affirmed.

Respectfully submitted,

HARRY SHAPIRO,
HIRSH W. STALBERG,
Attorneys for Respondents.

RESPONDENTS' APPENDIX.

(1)* IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26967.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Plaintiffs,

v.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND AND SAMUEL FRIEDLAND,

Defendants.

Philadelphia, Pa., November 5, 1959.

Before HON. HAROLD K. WOOD, *J.*

* * *

(13) Mr. Schaffer: . . .

(14) Now, that leads to the other point. If Your (15) Honor will recall—and it was just either prior to or after your elevation to the Bench, and the motion was argued before His Honor Judge Kraft—I had filed a motion to obtain prior right to take depositions. Judge Kraft denied that motion.

* * *

* Figures in parentheses refer to page numbers of typewritten transcript.

I, IDA O. CRESKOFF, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of proceedings before Honorable Harold K. Wood on November 5, 1959, in Civil Action No. 26967, received as part of the record on appeal in the case of John Taxin, et al. v. Food Fair Stores, Inc., et al., appeal No. 13,218, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of
(Seal) April in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.

(1) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26967.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Plaintiffs,

v.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND AND SAMUEL FRIEDLAND,

Defendants.

Philadelphia, Pa., December 28, 1959.

Before HON. HAROLD K. WOOD, *J.*

(IN CHAMBERS.)

(2) Present:

LESTER J. SCHAFFER, ESQ., attorney for plaintiffs.

SHAPIRO, ROSENFELD, STALBERG & COOK by HARRY SHAPIRO, ESQ., and I. E. ROBINSON, ESQ., attorneys for Food Fair Stores, Inc., World Wide Produce Co., Inc., Israel Klein Co., Inc., Klein Packing Co., Inc., Imperial Vegetable Co., Inc., Garden Fresh Vegetable Packing Co., Inc., Twin Packing Co., Inc., Delaware Valley Fruit Distributing Co., Inc., Arthur Rosenberg, Louis Stein, Myer Marcus, George Friedland and Samuel Friedland, defendants.

DILWORTH, PAXSON, KALISH, KOHN & DILKS by JACOB KALISH, ESQ., attorneys for Samuel P. Mandell Co., Inc., Mandell Distributing Co., Inc., and Samuel P. Mandell, defendants.

(Discussion off the record.)

Mr. Shapiro: I would like to state for the record, since I have raised this question, that we proceeded to depositions today, I did, on the assumption that we were going to take the depositions only on the question of whether or not the release was valid, whether it was obtained by fraud; that Mr. Schaffer by his notice to take depositions indicates quite clearly that he intends and intended to go into the whole question of the conspiracy, and I objected and as a result we arranged an appointment with Your Honor.

I take the position that it is clear from everything that has happened thus far, particularly that for (3) three months we have been engaged in arguing out the question as to whether or not the defendants are entitled to have separately tried the question of whether this release is valid or not, it having been pointed out and made clear, I think to everybody, that if there is a valid release and that question is determined the case itself will be shortened consid-

erably. Therefore, I think that Mr. Schaffer should be told by the Court that, if I am right, he is restricted in the testimony in depositions to determining the question of whether or not this release was obtained by fraud, is valid or is invalid.

The Court: Mr. Schaffer?

Mr. Schaffer: The plaintiffs' position in this case, or on this point, is based principally on Your Honor's opinion and order filed December 14, 1959. After considerable argument—and the Senator is right; we did argue the point—Your Honor determined to order a separate trial, over my protest. The other problem involved in those arguments involved the question whether or not there should be a jury trial, and Your Honor did grant a jury trial.

I say to Your Honor, as honestly as I can say it, the only reason I did not take an appeal was because I thought that getting the jury trial we could at least get to the heart of this case. However, I would have taken an appeal, and I will ask Your Honor for some relief when I finish (4) with this statement. I did not take an appeal because Your Honor agreed with the argument that I had made—whether or not you understood it and whether or not you agreed with it—that I would have the opportunity to prove that this release was obtained as part and parcel of the conspiracy. I quote from your opinion:

> "With regard to the evidence necessary to determine the issue of whether the release was obtained as 'part and parcel of the conspiracy,' plaintiffs will not be limited in their presentation of evidence to support this argument. However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is 'part and parcel of the conspiracy' could detract from its validity. Nevertheless,"—and I underline; this is not in the quote—

"as we pointed out above, plaintiffs will be free to develop this argument at the separate trial."

That is on page 3 of Your Honor's opinion. On pages 5 and 6 of Your Honor's opinion the following appears:

> "On that date, . . ." (February 15, 1960) ". . . a separate trial will be held in which the parties may (5) present evidence and arguments on the following questions: . . . (2) Whether the release is void because it was obtained as 'part and parcel of the conspiracy' . . ."

Now, Your Honor, as my notice will confirm, I assumed from the language in your opinion and order that I was not to be limited at this separate trial. The Senator has used the expression and Your Honor has used the expression "whole conspiracy." I don't know what that means. I think that if I am to be able to proceed to represent my clients to have the following question answered, whether the release is void because it was obtained as part and parcel of a conspiracy, I have a right to introduce evidence at this trial to show what the conspiracy was. I cannot operate in a vacuum. I say to Your Honor—and I think my notice confirms it—whether it is my fault or not I was misled.

Now, I will ask Your Honor to do this. Under the rule providing for an interlocutory appeal, I would like Your Honor to enter an order nunc pro tunc so that I will be protected and can go to the Court of Appeals, because it is futile for me to go into this separate trial unless I can prove that the release was part of a conspiracy. It is absolutely futile for me to do it, and we might as well, even if it takes the time, test it now.

Mr. Shapiro: May I correct something? You (6) say it is futile for you to go into the separate trial unless you can prove. You mean it is futile to go on with these depositions unless you are permitted to prove the whole conspiracy and that this release was part of it.

Mr. Schaffer: I think both, Senator. I think it is futile to continue the depositions and I think it is futile for me to go into the separate trial, because I think, right or wrong, a basic part of my case is taken away from me at this separate trial.

The Court: Well, you have maintained that from the beginning.

Mr. Schaffer: I know, sir, and I know that you haven't agreed with me. But when I got your opinion I had to follow your opinion.

The Court: You have used so many general terms here that I have a little difficulty pinning them down.

What do you mean by not to be limited at these depositions with which we are concerned at the moment? What do you want to develop?

Mr. Schaffer: I want to develop the general conspiracy that I claim exists in this basic case.

The Court: Well, that you will not be permitted to do.

Mr. Schaffer: All right, Your Honor.

(7) The Court: And if that is your request it is denied. And your request for an interlocutory order is denied.

Now, you will be permitted to raise any discovery that you wish to in these depositions, which you can connect up with the obtaining of this release. But you are not going to prove the general conspiracy which you charge in your complaint at this time, and it was never intended that you would, nor was it intended that after the release question is resolved that you would be precluded from doing it at that time. I don't know what will happen after that.

Mr. Schaffer: Your Honor, if I lose, the release question will be res judicata then.

The Court: Well, that is your misfortune.

Mr. Schaffer: It is not my misfortune, sir, not when you write an opinion saying what you said in your opinion and in your order.

Mr. Shapiro: I think it is perfectly consistent, what he said in the opinion and order.

Mr. Schaffer: I respectfully disagree with you. I think it is so painfully obvious to me, if I can understand the English language, what was meant.

Mr. Shapiro: I think you better respectfully disagree with the Judge, not with me. You don't have to (8) disagree with me.

Mr. Schaffer: I respectfully disagree with both of you, and respectfully.

It seems to me, Your Honor, that this language in the opinion is meaningless, and I say to Your Honor that I was misled by it.

The Court: It is not meaningless, and if you were misled by it you should have come to see me about it.

Mr. Schaffer: Why, it is so painfully clear and abundantly clear to me.

The Court: It isn't painfully clear when you order a separate trial to determine the validity of a release, why you would get the impression that you can prove the entire conspiracy charged in your complaint. That is perfectly ridiculous, in my opinion.

Mr. Schaffer: But you didn't say that in your opinion, Your Honor. You said you didn't understand it.

The Court: I didn't think it would be necessary to understand it. If you can tie the release up to some conspiracy which you say existed and you can direct your questions to the validity of the release, or whether it was obtained by fraud, or anything else that you seem to think it was, that is your privilege. But to go into the whole con-

spiracy charged in your complaint, why, that would be simply (9) futile.

Now, if you have any more definitive request you want to make I will try to rule on it, but I am certainly not going to allow you to prove the conspiracy alleged in your complaint at this time.

Mr. Schaffer: Well, I know it is improper to ask any judge, and particularly Your Honor, a question, because I do want to be respectful. But I am just amazed; I am astounded. I cannot understand your language on page 3 of your opinion, starting with the word "Clearly."

The Court: You have told me that three or four times and I am sorry that you can't understand it. There is no use laboring the point.

Mr. Schaffer: Well, I state to Your Honor, whether I am laboring it or not, that I was misled by that language, and I repeat——

The Court: I am sorry that you were misled by it. You are not misled now.

Mr. Schaffer: No, sir, but I am asking for something now.

The Court: And I am denying it.

Mr. Schaffer: And I take it Your Honor has denied it.

The Court: That is right.

(10) Mr. Schaffer: Well, I will then have to determine what to do.

Mr. Shapiro: In the meantime, we have depositions continuing at 2:30.

The Court: You can continue your depositions and as long as they are related to the issue as of the trial date, as of that release, why, that is perfectly satisfactory. You understand, and you should have understood all along, that at some future date if this matter continues you can take all

the depositions you want in regard to the conspiracy, but we haven't reached that point now.

Mr. Schaffer: Your Honor, the separate trial is on the issue of the release.

The Court: That is right, and that is the only thing that is material at this moment.

Mr. Schaffer: But that is not what Your Honor said in your opinion nor in your order.

The Court: Well, I don't agree with you. And that is what I am saying now, anyway.

Mr. Schaffer: All right, sir.

(Adjourned at 2:05 o'clock P. M.)

Reported by:
Russell T. Harris, Jr.

I, IDA O. CRESKOFF, Clerk of the United States Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of proceedings before Honorable Harold K. Wood on December 28, 1959, in Civil Action No. 26967, received as part of the record on appeal in the case of John Taxin, et al. v. Food Fair Stores, Inc., et al., appeal No. 13,218, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of
(Seal) April in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.

(1) IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26967.

JOHN TAXIN AND BERNARD TAXIN, TRADING AS JOHN TAXIN CO.,

Plaintiffs,

v.

FOOD FAIR STORES, INC., SAMUEL P. MANDELL CO., INC., WORLD WIDE PRODUCE CO., INC., MANDELL DISTRIBUTING CO., INC., M. G. S. MARKETING CO., INC., M. G. S. TOMATO DISTRIBUTORS, INC., ISRAEL KLEIN CO., INC., KLEIN PACKING CO., INC., IMPERIAL VEGETABLE CO., INC., GARDEN FRESH VEGETABLE PACKING CO., INC., TWIN PACKING CO., INC., DELAWARE VALLEY FRUIT DISTRIBUTING CO., INC., J. & B. PRODUCE CO., INC., SAMUEL P. MANDELL, ARTHUR ROSENBERG, LOUIS STEIN, MYER MARCUS, GEORGE FRIEDLAND AND SAMUEL FRIEDLAND,

Defendants.

Pretrial oral examination of Samuel P. Mandell, defendant taken on behalf of the plaintiffs, pursuant to agreement, at the offices of Lester J. Schaffer, Esq., 1610 Two Penn Center Plaza, Philadelphia, Pennsylvania, on Monday, January 11, 1960, beginning at 11:40 o'clock A. M., Eastern Standard Time, before George H. Lennox, Jr., Notary Public-Court Reporter.

* * * *

(3) SAMUEL P. MANDELL, having been duly sworn, was examined and testified as follows:

By Mr. Schaffer:

* * *

(12) Q. Let's take the situation where you were selling to Food Fair and getting a quarter profit. Would your quarter profit be fixed or would it depend on what the market was at that time?

Mr. Kohn: That is objected to. I think we are getting into a great deal of detail here.

I have not objected up until now because I thought it was certainly not inappropriate, even on the limited scope of the examination, to get some of the background to understand how the business was conducted; but I will object from here on if we are going into any more detail about the general nature or specific items of operation.

Mr. Schaffer: And you direct him not to answer?

(13) Mr. Kohn: Yes.

Mr. Schaffer: Well, as I have said to the Senator, I think your objection is certainly well taken as Judge Wood has interpreted his opinion.

Mr. Shapiro: I would like to say to you on the record that there is nothing in the order which would prevent you from assuming that there was a conspiracy for the purpose of your questions, and then proving that the release was part and parcel of the conspiracy.

I don't want anything that I have said at any time to indicate (and I don't think it has indicated to you) that I object to your trying to prove from these witnesses now that the release was part and parcel of the conspiracy. All that the judge said to you was that you can't prove the basic conspiracy which you have alleged or examine into the basic conspiracy that you have alleged in your pleading at this time.

Mr. Schaffer: Well, I have tried—

Mr. Shapiro: He also said to you that if you could prove this was part and parcel of the conspiracy, that

this release was part and parcel of the conspiracy, you go ahead.

So I do not and I am sure Mr. Kohn does not intend to limit you in your questions to proving that this (14) release was part and parcel of a conspiracy, assuming that a conspiracy existed. What you are asking now is merely going directly to the question of whether there was a conspiracy.

Mr. Schaffer: I will state for the record (and I suppose, of course, it is repetitious) that it is my position that I cannot try even this separate trial in a vacuum. If I am to be permitted to prove that the release was part and parcel of a conspiracy, I think that I have to at least give this jury some idea of what this conspiracy was.

Mr. Shapiro: I don't agree that you have to.

Mr. Schaffer: I know you don't.

Mr. Shapiro: I say you can assume that there was a conspiracy. If you have any evidence to prove that this was part and parcel of a presumed conspiracy, go ahead and prove it. I don't think any of us will object to that.

Mr. Schaffer: I have used the expression many times that I feel that I cannot try this case in a vacuum, and even on your statement I would be trying it in a vacuum.

Mr. Shapiro: I am concerned only with making our position clear. I know your position and I am not trying (15) to affect your position, except to tell you clearly that we do not object to your going on the assumption that there was a conspiracy and attempting to prove how this release was part and parcel of it.

• • •

I, IDA O. CRESKOFF, Clerk of the United States Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of pretrial examination of Samuel P. Mandell in Civil Action No. 26967, received as part of the record on appeal in the case of John Taxin, et al. v. Food Fair Stores, Inc., et al., appeal No. 13,218, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of
(seal) April in the year of our Lord one thousand nine hundred and sixty, and of the Independence of the United States the one hundred and eighty-fourth.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals, Third Circuit.